Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 15, 2005

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QUESTIONS PRESENTED

1. Whether an entity that is wholly and beneficially owned by a foreign state's instrumentality, and whose sole purpose is to perform international treaty and trade agreement obligations for the benefit of the foreign state's citizens, may nonetheless be denied status as an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603(b)(2), based on an analysis of sovereignty that ignores the circumstances surrounding the entity's creation, conduct, and operations on behalf of its government.

2. Whether an entity is an "organ of a foreign state" under the FSIA when its shares are completely owned by a governmental corporation that, by statute, performs all of its acts as the agent of the foreign sovereign.

PARTIES TO THE PROCEEDINGS

Petitioner Powerex Corp. was a cross-defendant/appellant/appellee in the district court and court of appeals proceedings.

The following also were parties to the district court and court of appeals proceedings and are respondents in this Court:

AES Corporation was a defendant

AES Redondo Beach, LLC was a defendant

AES Alamitos, LLC was a defendant

AES Huntington Beach, LLC was a defendant

Arizona Electric Power Cooperative, Inc. was an intervenor/cross-defendant/appellee

Arizona Public Service Company was a cross-defendant/appellee

Automated Power Exchange, Inc. was a cross-defendant/appellee

Avista Energy, Inc. was an intervenor/cross-defendant/appellee

Bonneville Power Administration was a cross-defendant/appellant/appellee

Borrego Water District was a plaintiff

British Columbia Hydro and Power Authority was a cross-defendant/appellee

Cruz M. Bustamante was a plaintiff/appellee

Cabrillo Power I, LLC was a defendant/appellee

Cabrillo Power II, LLC was a defendant/appellee

City and County of San Francisco was a plaintiff

City of Los Angeles Department of Water and Power was a cross-defendant/appellee

City of Oakland was a plaintiff

Commission de Federale Electricidad was a cross-defendant/appellee

Constellation Power Source (now Constellation Energy Commodities Group) was a cross-defendant/appellee

County of Santa Clara was a plaintiff

Mary L. Davis was a plaintiff

Department of Energy was a cross-defendant/appellee

Duke Energy Morro Bay, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy Moss Landing, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy Oakland, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy South Bay, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy Trading and Marketing, LLC was a defendant/cross-claimant/appellant/appellee

Dynegy, Inc. was a defendant

Dynegy Marketing and Trade was a defendant

Dynegy Power Marketing, Inc. was a defendant

El Segundo Power, LLC was a defendant/appellee

Fallbrook Public Utility District was a plaintiff

General Public of the State of California was a plaintiff/appellee

Pamela R. Gordon was a plaintiff/appellee

Hafslund Energy Trading LLC was a cross-defendant/appellee

Helix Water District was a plaintiff

Ruth Hendricks was a plaintiff/appellee

Barry H. Himmelstein was a plaintiff/appellee

IDACORP Energy, L.P. was an intervenor/cross-defendant/appellee

Idaho Power Company was an intervenor/cross-defendant/appellee

Patrick N. Keegan was a plaintiff/appellee

Long Beach Generation, LLC was a defendant/appellee

Barbara Mathews was a plaintiff/appellee

Metropolitan Transit Development Board was a plaintiff

MIECO, Inc. was a cross-defendant/appellee

Mirant Americas Energy Marketing L.P. (fka Southern Company Energy Marketing, L.P.) was a defendant

Mirant California, LLC (fka Southern Energy California, LLC) was a defendant

Mirant Delta, LLC (fka Southern Energy Delta, LLC) was a defendant

Mirant, Inc. (fka Southern Energy, Inc.) was a defendant

Mirant Potrero, LLC (fka Southern Energy Potrero, LLC) was a defendant

Morgan Stanley Capital Group Inc. was a defendant

Nevada Power Company was a cross-defendant/appellee

Northern California Power Agency was an intervenor/cross-defendant/appellee

NRG Energy, Inc. was a defendant/appellee

Oscar's Photo Lab was a plaintiff

PacifiCorp was a cross-defendant/appellee

PacifiCorp Power Marketing Inc. was a cross-defendant/appellee

Padre Dam Municipal Water District was a plaintiff

People of the State of California was a plaintiff/appellee

PG&E Energy Trading Holdings Corporation was a defendant

PG&E Energy Trading-Power, L.P. was a defendant

Pier 23 Restaurant was a plaintiff/appellee

Plant General Electric Company was a cross-defendant

Portland General Electric Company was a cross-defendant/appellee

PP&L Montana, LLC was a cross-defendant/appellee

Public Service Company of New Mexico was a cross-defendant/appellee

Puget Sound Energy, Inc. was an intervenor/cross-defendant/appellee

Ramona Municipal Water District was a plaintiff

Reliant Energy Coolwater, Inc. (fka Reliant Energy Coolwater, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Ellwood, Inc. (fka Reliant Energy Ellwood, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Etiwanda, Inc. (fka Reliant Energy Etiwanda, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Mandalay, Inc. (fka Reliant Energy Mandalay, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Services, Inc. was a defendant/cross-claimant/appellant/appellee

Reliant Ormond Beach, Inc. (fka Reliant Ormond Beach, LLC) was a defendant/cross-claimant/appellant/appellee

Sacramento Municipal Utility District was an intervenor/cross-defendant/appellee

Salt River Project Agricultural Improvement and Power District was an intervenor/cross-defendant/appellee

San Diego Transit Corporation was a plaintiff

San Diego Trolley, Inc. was a plaintiff

Sempra Energy, Inc. was a defendant/appellee

Sempra Energy Resources was a defendant/appellee

Sempra Energy Trading was a defendant/appellee

Sierra Pacific Industries was an intervenor/cross-defendant/appellee

Sierra Pacific Power Company was a cross-defendant/appellee

Sierra Pacific Resources was a cross-defendant/appellee

Silicon Valley Power (City of Santa Clara) was an intervenor/cross-defendant/appellee

Sunlaw Cogeneration Partners I (now Sunlaw Energy Partners I, L.P.) was a cross-defendant/appellee

Sweetwater Authority was a plaintiff/appellee

Trans Alta Energy Marketing Company was an intervenor/cross-defendant/appellee

Trans Canada Power Company was a cross-defendant

Tucson Electric Power Company was an intervenor/cross-defendant/appellee

United States of America was a cross-defendant/appellee

Valley Center Municipal Water District was a plaintiff

Vista Irrigation District was a plaintiff

Western Area Power Administration, Colorado River Storage Project, was a cross-defendant/appellee

The Williams Companies, Inc. was a defendant

Williams Energy Marketing & Trading Co. was a defendant

Williams Energy Services Co. was a defendant

Yuima Municipal Water District was a plaintiff

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Powerex Corp. states the following:

Powerex Corp. is a Canadian corporation incorporated under British Columbia's Company Act. Powerex is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia. No publicly held company owns any Powerex stock.

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Powerex Corp. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This case raises issues of immediate significance to the well-established practice of "governments throughout the world" using "separately constituted legal entities" to perform inherently sovereign functions. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 624 (1983). The Ninth Circuit erred in construing two aspects of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.* (the "FSIA"): first, in a decision that directly conflicts with the judgments of the Second, Third, and Fifth Circuits, the court defined an "organ of a foreign state or political subdivision" under § 1603(b)(2) in a mechanistic way that excludes pertinent evidence of the foreign sovereign's purpose in establishing the entity to perform international treaty and cross-border trade functions. Second, the Ninth Circuit created a test for a foreign state's ownership of a government corporation that ignores an agency relationship expressly created by statute. In addition to creating judicial conflicts, both holdings undermine Congress's purpose in enacting the FSIA to establish a uniform platform for international trade and relations with the United States that respects the substantive and procedural protections that all sovereign nations reasonably expect.

In this case, petitioner Powerex Corp. ("Powerex") was concededly created by the Province of British Columbia to sell electricity in the United States for the sole benefit of the Province from hydropower resources wholly owned and operated by the Province, and was likewise tasked by the Province to fulfill international treaty obligations that the Province (and Canada) agreed to perform with the United States. In a decision that defies the law, the facts, and common sense, the Ninth Circuit held that Powerex was *not* a foreign sovereign while simultaneously holding that

a United States entity performing the same functions under the same treaty is a *domestic* sovereign.

The Ninth Circuit's discordant holdings deny Powerex its right under the FSIA to remove this suit from state court and to enjoy the procedural protections (including the right to a bench trial) that Congress has afforded to foreign sovereigns under the FSIA. Because this case has profound effects on U.S.-Canada bilateral relations, the proper interpretation of the FSIA, and the commercial dealings of numerous foreign sovereign entities within the United States, this petition should be granted.

OPINIONS BELOW

The district court's opinion granting plaintiffs' motion to remand (Pet. App. 18a-44a) is unreported. The court of appeals' opinion (*id.* at 1a-17a) is reported at 391 F.3d 1011.

JURISDICTION

The court of appeals entered its judgment on December 8, 2004. A petition for rehearing en banc was denied on March 3, 2005. Pet. App. 45a. On May 23, 2005, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 1, 2005, *id.* at 215a, and on June 22, 2005, further extended the time for filing to and including July 15, 2005, *id.* at 216a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY & STATUTORY PROVISIONS INVOLVED

Relevant treaty and statutory provisions are set forth at Pet. App. 61a-214a.

STATEMENT OF THE CASE

1. This case arises out of consolidated actions originally filed in California state court by a class of plaintiffs (respondents here) against a number of defendants (also respondents here), including Reliant Energy Services, Inc. ("Reliant") and Duke Energy Trading and Marketing, LLC ("Duke"). Reliant and Duke are independent generators that sold power in the California wholesale electricity markets. The proposed plaintiff class consists of "all per-

sons and other entities in California who purchased electricity from [San Diego Gas & Electric, Southern California Edison, or Pacific Gas & Electric] for purposes other than resale or distribution since January 1, 1999." C.A. ER (PWX) 0019-0020, ¶ 72. The respondent-plaintiffs allege that defendants violated California's Cartwright Act and Unfair Competition Law by acting in concert to withhold supply, create artificial shortages, and manipulate prices in California electricity markets. *See* Pet. App. 7a. Powerex was not named as a defendant by plaintiffs.

Reliant filed a cross-complaint against Powerex, the British Columbia Hydro and Power Authority ("BC Hydro"), other alleged market participants, and two federal agencies, the Bonneville Power Administration ("BPA") and the Western Area Power Administration ("WAPA"). Duke also filed a cross-complaint against Powerex, BPA, WAPA, and several other entities, but not BC Hydro. The cross-complaints alleged that the cross-defendants sold power in significant amounts at the prices complained of by the plaintiffs and that the cross-defendants participated in the bidding process by which market prices were set in the California Power Exchange and California Independent System Operator organized markets.

Powerex and BC Hydro removed the action to district court as foreign states under 28 U.S.C. §§ 1441(d) and 1603(a) of the FSIA. The federal agency defendants, BPA and WAPA, also removed the case as federal "officer[s]" or "agenc[ies]" under § 1442(a)(1). The plaintiffs moved to remand, which Powerex and others opposed.

2. The undisputed evidence adduced in the district court demonstrated the following:

In 1961, Canada and the United States signed the Columbia River Treaty (the "Treaty"),[1] under which Canada agreed to construct reservoir facilities in Canada to con-

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[1] Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555 (Pet. App. 61a-137a).

trol the flow of the Columbia River in a way that would enable the United States to generate more power at its existing facilities on the Columbia River ("Downstream Benefits") and to provide enhanced flood control benefits to the U.S. Treaty Art. II (Pet. App. 63a-64a). In return, Canada received a right to half of the Downstream Benefits over the 60-year life of the Treaty (the "Canadian Entitlement"). *Id.* Art. V, § 1 (Pet. App. 66a). Canada and the United States were required to appoint "entities" to administer the Treaty. *Id.* Art. XIV, § 1 (Pet. App. 74a).

In 1962, the British Columbia Provincial Government passed the British Columbia Hydro and Power Authority Act to establish an entity in which to hold assets it acquired and to promote major hydroelectric development, which included construction of significant storage dams and hydroelectric generating capacity on the Peace and Columbia River Systems (the "Two River Policy"). In 1964, the Provincial Government enacted another British Columbia Hydro and Power Authority Act ("Hydro Act"), which created the Provincial Crown Corporation known today as BC Hydro. *See* Pet. App. 7a. The Act enumerated all of BC Hydro's powers (including powers not generally available to private companies in British Columbia). The Act specifically provides that BC Hydro "is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government." Hydro Act § 3(1) (Pet. App. 166a).

As a Provincial Crown Corporation, BC Hydro is owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia, by which name the Province is formally known. Dividends from BC Hydro's operations are payable only to the Province. All substantive powers of BC Hydro are subject to, and can only be exercised with, the approval of the Lieutenant Governor in Council or the Minister responsible for BC Hydro. Since its creation, BC Hydro has implemented the Two River Policy by building dams, developing storage capacity, and operating hydroelectric generating facilities. *See* Pet. App. 50a.

In 1964, Canada designated BC Hydro as the Canadian entity responsible for administering the Treaty. The United States designated BPA and the Army Corps of Engineers collectively as the United States entity. That same year, Canada, the Province, and the United States agreed to a Protocol for the implementation of the Treaty that provided, in a separate document, that British Columbia would receive an upfront payment in place of return of the first 30 years of the Canadian Entitlement.

By 1984, BC Hydro completed construction of the Revelstoke Dam on the Columbia River, the last of the major facilities contemplated under the Two River Policy. Because the Province's storage capacity greatly exceeded the Province's own electricity needs, BC Hydro became an active seller of power in foreign commerce at the international border to U.S. entities, principally BPA. Such sales, as well as the trading of the Canadian Entitlement to BPA-generated power in exchange for an upfront cash payment, accorded with the British Columbia Government's aim under the Treaty of maximizing the hydroelectric production capacity of the Columbia and Peace Rivers.

In the late 1980s, the Provincial Government undertook an overhaul of legislation governing the energy sector in British Columbia. The Hon. Jack Davis, then Minister of Energy, Mines and Petroleum Resources, described the export of surplus power as a governmental function:

> An export agency, I think, is desirable. It will begin its life this summer as a subsidiary of B.C. Hydro, simply because Hydro has the personnel and the expertise to do that kind of work without adding unduly to personnel.
>
> In the longer term, I think that agency should not be seen as a child or a part of Hydro. It should deal with long-term export opportunities. The reason for creating an agency – a single marketing desk, if I can describe it that way – is merely to drive a good bargain in the U.S.A. and not have competing B.C.

> or Canadian projects vying with each other on the U.S. side of the line. We sell from strength, in other words.

C.A. ER (PWX) 0608.

In December 1988, BC Hydro – acting as agent of the Provincial Government under the Hydro Act – incorporated the British Columbia Power Exportation Corporation under the Company Act of British Columbia as a wholly owned subsidiary of BC Hydro to serve the vital role of marketing the Province's surplus electric power. *See* Pet. App. 53a. The company changed its name in 1991 to the British Columbia Power Exchange Corporation, and in 2000 to Powerex Corp. *See id.*

From its inception, Powerex performed functions prescribed by Provincial officials. It took delivery of the Province's electricity available for export at the British Columbia border and sold it in the U.S. and Alberta. In the early 1990s, the Province directed Powerex to explore means of creating a more efficient Provincial power market for the trading of electricity among utilities, independent power producers, industrial consumers, and other major electricity consumers. Powerex also participated with BC Hydro in direct negotiations with the Corps of Engineers and BPA to define the Canadian Entitlement because, early in those talks, the potential for resale of the Canadian Entitlement in the U.S. became a prominent aspect of the negotiations. Ultimately, in 1999, the Province and BC Hydro assigned their rights, title, and interest in the Canadian Entitlement to Powerex. An agreed-on share of the proceeds from Powerex's marketing of the Canadian Entitlement is passed directly to the Province. The remainder of Powerex's "profits" are then consolidated into BC Hydro's net income, which, in turn, is available for distribution through the Province's general revenues and/or to a "Rate Stabilization Account" for maintaining lower electricity rated for the Province's citizens.

In 1997, the Province enacted the Power for Jobs Development Act ("Jobs Act"), which directed that portions of BC Hydro's surplus electricity, including a Provincial Government-determined portion of the Canadian Entitlement otherwise for sale by Powerex externally, would be diverted to British Columbia industry to create jobs. *See* Jobs Act § 2 (Pet. App. 193a). The Jobs Act directed BC Hydro and Powerex to supply power to British Columbia businesses on terms defined by the Provincial Government. *See id.* § 3 (Pet. App. 193a).

In addition, Powerex was directed by the Province to perform treaty obligations incurred by the Province under the U.S.-Canadian Skagit River Treaty.[2] Under that agreement, the City of Seattle agreed not to raise the High Ross Dam, which would have had the effect of flooding substantial areas of British Columbia. In exchange, British Columbia agreed to deliver substantial quantities of electricity to Seattle through 2066. In the late 1990s, Powerex took the lead in negotiating transmission arrangements, pursuant to which BPA agreed to deliver to Seattle the power that Powerex obtained from BC Hydro. *See* Pet. App. 56a-57a. Powerex's treaty responsibilities increased from an assignment of certain BC Hydro rights and obligations under the Treaty to Powerex.

The uncontradicted evidence further showed that, pursuant to Provincial legislation and regulations, all of Powerex's earnings are consolidated with those of BC Hydro for purposes of establishing BC Hydro's electricity rates.[3] Under a formula set by Provincial laws and regulations, BC Hydro annually pays to the Province accumulated net

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[2] Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, T.I.A.S. No. 11088, 1469 U.N.T.S. 309 (Pet. App. 138a-146a).

[3] Special Direction No. 8 to the British Columbia Utilities Commission, B.C. Reg. 71/98, amended by B.C. Regs. 72/98, 73/98, and 119,2000, §§ 3-5 (Pet. App. 206a-214a).

income from the combined operations of BC Hydro and Powerex.[4] Because it is entirely owned by BC Hydro, which is statutory agent of the Province, Powerex is also subject to the Financial Administration Act, pursuant to which the Province: issues regulations or directives regarding the planning, management, and reporting of capital expenditures by government bodies; creates a special account under Provincial control for insurance and risk management services; requires financial and accounting operations to be reported to the Provincial Comptroller General; and mandates that investments, loans, and debts be administered through the Province.[5] The Lieutenant Governor in Council appoints BC Hydro's board of directors, and these Provincially appointed board members also constitute a majority of Powerex's board of directors. Those same Provincially appointed board members then appoint Powerex's remaining outside directors, subject to Provincial approval. *See id.* at 58a-59a.

BC Hydro further acts as Powerex's treasurer, and BC Hydro's borrowings in turn are guaranteed by the Province. *See id.* at 59a. Unlike private corporations, Powerex is exempt from income taxes under the Canadian and Provincial tax laws.[6]

3. Once the case was removed to federal court, and given the enormous breadth of the plaintiffs' proposed class, all of the federal district court judges in California's three federal districts recused themselves from hearing this matter, necessitating the designation of the Honorable Robert H. Whaley of the United States District Court for the Eastern District of Washington to preside over the

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[4] Special Directive No. 4 to the British Columbia Hydro and Power Authority, O.1.c. 494/2000, §§ 5-8 (Pet. App. 203a-204a).

[5] Financial Administration Act, [R.S.B.C. 1996], ch. 138, §§ 1(b), 4.1, 8, 30, *at* http://www.qp.gov.bc.ca/statreg/stat/F/96138_01.htm.

[6] Constitution Act, 1867 (The British North America Act), 30 & 31 Vict., ch. 3 (U.K.), [R.S.C. 1985], App. II, No. 5, § 125 (Pet. App. 162a).

case.[7] Following petitioner's removal of the case to federal court, the plaintiffs moved to remand. BPA, WAPA, and BC Hydro all opposed remand based on their governmental status, and further moved to dismiss based on their sovereign immunity.

Powerex opposed remand on the ground that it was an instrumentality of a foreign sovereign. Powerex conceded that it did not enjoy immunity from suit under the FSIA (because its electricity sales in the United States constitute a "commercial activity" within the enumerated exceptions to sovereign immunity under the FSIA, *see* 28 U.S.C. § 1605(a)(2)). But Powerex maintained that, as a foreign sovereign, the FSIA's jurisdictional and procedural safeguards governed, which meant that the case against it could proceed only in a bench trial in federal court.

On December 13, 2002, the district court entered an order granting the motion to dismiss of BC Hydro, finding that it was immune from suit. *See* Pet. App. 8a.[8] The court further held that Powerex was not entitled to remove this case under the FSIA. While outlining some of the facts demonstrating Powerex's inseparable connection to the Province of British Columbia, the court nonetheless viewed Powerex as "closely analogous" to the corporation in *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *aff'd in part*, 538 U.S. 468 (2003). From that analogy alone, the court held that Powerex was not an organ of the Province under § 1603(b)(2). *See* Pet. App. 34a-36a. The court held dispositive that Powerex does not possess "regulatory authority," is not immune from suit under Canadian law, and is not subject to daily governmental

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[7] The judges of the California Superior Court have not recused themselves or taken any similar action.

[8] The district court also held that it lacked jurisdiction over cross-claims against BPA and WAPA under the doctrine of derivative jurisdiction and 28 U.S.C. § 1441(e), finding that both entities were entitled to sovereign immunity. *See* Pet. App. 38a-44a. Rather than dismiss BPA and WAPA from the suit, however, the district court remanded the entire action to the state court. *See id.* at 44a.

oversight. *Id.* at 35a. The court deemed it unnecessary to address the other evidence of Powerex's sovereign status. *Id.* at 35a-36a. The court then rejected Powerex's contention that, as the wholly owned entity of the Province's statutory agent BC Hydro, BC Hydro's ownership of Powerex must be imputed to the Province under ordinary tenets of agency law. The court read Ninth Circuit precedent as holding that "a corporation owned by an instrumentality of a foreign government is not itself an instrumentality of that government." *Id.* at 36a. Accordingly, the court dismissed BC Hydro as a defendant and remanded the case as to BPA, WAPA, and Powerex.

4. Powerex timely appealed, and the Ninth Circuit affirmed the order of remand.[9] The court initially explained that the relevant inquiry under § 1603(b)(2) is whether the entity engages in a public activity on behalf of a foreign government. *See* Pet. App. 15a. The court acknowledged some record evidence that Powerex "serves a public purpose" on behalf of Provincial citizens. *Id.* at 16a. The court then announced a test that enabled it to disregard record evidence: "[Powerex's] high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law[,] *dictate* our holding that PowerEx [*sic*] is not an organ of British Columbia." *Id.* (emphasis added). The Court did not address the substantial evidence demonstrating Powerex's activities serving the national interests of Canada and the Province – including the circumstances of Powerex's creation, the scope and nature of its activities on behalf of the Province, and employment policies requiring Provincial appointment and approval of Powerex's

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[9] BPA and WAPA also appealed the district court's remand of the cross-claims against both agencies. The court of appeals held that the cross-claims must be dismissed pursuant to § 1442(a) and thus vacated the portion of the district court's order remanding the remaining claims against those federal entities. *See* Pet. App. 16a-17a. BPA and WAPA have subsequently been dismissed from this action.

board members and outside directors – which Powerex submitted as key attributes of sovereign status.

As to the Province's ownership of Powerex, the court rejected petitioner's contention that the Province directly owned Powerex through BC Hydro as the Province's statutory agent. The court read this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), as foreclosing such an analysis because, "unless the foreign government itself actually owns the shares, the entity does not meet the definition of a foreign state." Pet. App. 16a (citing 538 U.S. at 474-76).

REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit's ruling conflicts with the decisions of three other circuits on an issue of critical importance to the unhindered flow of cross-border and international commerce. Contrary to the legal presumptions created by the Ninth Circuit's wayward ruling, Powerex is no mere for-profit energy corporation. Rather, it is an "organ" of a foreign state because its creation, purposes, conduct, and operations all reflect the public policy judgments of British Columbia, as enacted by Provincial statute and administered by public officials. Treating Powerex as a commercial enterprise disregards the Province's governmental role in cross-border electricity trade and water management pursuant to treaties between Canada and the United States. Powerex's electricity sales, which the court of appeals seized upon as evidence of a private, not public, purpose, are used to generate "profits" back to the British Columbia government for direct remittance to the Province to stabilize the rates that citizens pay for electricity, to comply with Provincial statutes to subsidize British Columbia businesses, or to meet other Provincial budgetary needs. Powerex is subject to a host of unique burdens, including oversight by Provincial officials, while enjoying privileges such as financial support from the Province and immunity from Provincial and federal taxation that private entities do not share.

The court's mechanical approach to the interpretation of § 1603(b)(2) makes all of those facts legally irrelevant and, consequently, renders insignificant the core question of whether the entity "engages in activity serving a national interest and does so on behalf of its national government." *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004). Because the result in this case would be different in the Second, Third, and Fifth Circuits, which reject a categorical approach in favor of a totality-of-the-circumstances inquiry, this Court should grant plenary review.

The practical consequences of the Ninth Circuit's decision are clear. Foreign governments will be exposed to the ad-hoc decision making of state courts within the Ninth Circuit's territorial reach for conduct that, in other circuits, remains appropriate for federal review under nationally uniform standards. If governmental entities are denied the jurisdictional and substantive protections of the FSIA because of the Ninth Circuit's restrictive, mechanistic test, there will be a chilling effect on future trade activity to the region's detriment. Such a result will also, inevitably, bring the United States into conflict with its cross-border partners over national obligations arising under NAFTA where, as here, judicial decisions produce favorable treatment for American entities at the expense of indistinguishable Canadian or Mexican agencies.

2. The Ninth Circuit's second holding also raises a question of great significance. The court misread the rule established by this Court in *Dole Food* that Congress intended the requirement of an "ownership interest" in § 1603(b)(2) of the FSIA to be governed by the common law standards applicable to private corporations. Notwithstanding this Court's guidance, the Ninth Circuit held that the FSIA absolutely precludes the application of common law principles of agency to entities owned by foreign governments through statutory agents in determining whether an entity is "owned" by the foreign government. That holding ignores the common law of corporate

agency under which BC Hydro's ownership of Powerex is imputed to its principal, the Province of British Columbia. The Ninth Circuit's decision thus confuses "ownership" with "control" and inverts this Court's holding to mean that "as a categorical matter" all agents are deemed distinct from their principals. *Dole Food*, 538 U.S. at 475-76.

Taken together, the Ninth Circuit's holdings simultaneously create great uncertainty as to the range of foreign entities protected by the FSIA (through its ad-hoc analysis of governmental organs) and establish an artificial test for ownership that ignores this Court's instructions in *Dole Food*. Given the tremendous volume of cross-border and international commerce implicated by the Ninth Circuit's ruling, the tensions over the treatment of governmental instrumentalities by courts in the United States is certain to increase. The need to correct the Ninth Circuit's erroneous interpretation of two separate FSIA provisions and to resolve a direct circuit conflict on an issue with significant international implications thus warrants this Court's review.

I. THE NINTH CIRCUIT CREATED A MULTI-CIRCUIT CONFLICT ON WHAT CONSTITUTES AN "ORGAN" OF A FOREIGN STATE UNDER THE FSIA

A. The Ninth Circuit's New Standard Eliminates The Fact-Specific Analysis Congress Intended For Determining Whether An Entity Of A Foreign Sovereign Is An Organ Of The State

1. The Ninth Circuit fundamentally misunderstood that Congress intended for courts to examine foreign entities claiming "organ" status under the FSIA by employing a fact-sensitive inquiry that considers a range of characteristics. As a general matter, the FSIA defines a "foreign state" broadly to include both the sovereign nation itself, and any "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a); *see Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460 (9th Cir. 1995) (concluding that Congress "intended the terms 'organ' and 'agency or instrumentality'

to be read broadly"). Section 1603(b) defines an agency or instrumentality to include any entity that (1) "is a separate legal person, corporate or otherwise," and is (2) "an organ of a foreign state" or "a majority of whose shares or other ownership interest is owned by a foreign state," and (3) "is neither a citizen of a State of the United States" nor "created under the laws of any third country." 28 U.S.C. § 1603(b)(1)-(3). There is no dispute that Powerex is a separate legal entity and is not a citizen of either the United States or some third country. *See* Pet. App. 14a. The only issue, therefore, is whether Powerex satisfies the definition of an "organ" under § 1603(b)(2).

Congress did not define the meaning of the term "organ." Nonetheless, commentators have consistently recognized that the fact-sensitive organ test is necessary to address entities that "might not have ownership interests familiar to American judges or lawyers, but that have close connections with the state." Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 Willamette J. Int'l L. & Disp. Resol. 57, 81 (2001); *see also* Report of the Working Group of the American Bar Association, *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 516 (2002); Joseph W. Hardy, Jr., Note, *Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act*, 31 Ga. L. Rev. 1121, 1161 (1997). Nor is Congress's silence on the definition of a foreign "organ" unusual in the context of the FSIA. Section 1603(d) defines a "commercial activity" only by "reference to the nature of the course of conduct." As the FSIA legislative history explains, this vague standard reflects the view that "[i]t has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable." H.R. Rep. No. 94-1487, at 16 (1976), 1976 U.S.C.C.A.N. 6604, 6615. Instead, Congress decided to grant the courts "a great deal of latitude in determining what is a 'commercial activity.'" *Id.* The omission of a precise definition of the term "organ" is thus similarly

indicative of Congress's intent to provide the courts with a broad and flexible standard for evaluating whether an entity is a foreign sovereign's "organ." *See Gates*, 54 F.3d at 1460 (concluding that Congress "intended the terms 'organ' and 'agency or instrumentality' to be read broadly").

2. The Ninth Circuit's decision in this case, which builds on its prior decision in *Dole Food*, honors none of these principles and instead embraces a mechanical and inflexible approach to organ status under the FSIA.[10] In this case, the Ninth Circuit determined organ status using none of the flexible and fact-specific analysis envisioned by Congress that would address the creation, composition, and daily functions of the entity. Instead, the Ninth Circuit below engaged in a rigid (and circumscribed) analysis of four factors: (1) the purpose of the entity's activities; (2) the entity's independence from the government; (3) the level of financial support from the government; and (4) the entity's immunity from suit. *See* Pet. App. 15a. That test disregards any consideration of critical characteristics such as the circumstances surrounding the entity's creation, employment requirements, or structures imposed by the foreign governments that other circuits have specifically held are crucial attributes of an organ's sovereign status. *See* pp. 19-20, *infra*.

Moreover, the characteristics selected by the Ninth Circuit as dispositive are contrary to both the FSIA's text and logic. First, the "degree of independence" inquiry is

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[10] Although this Court affirmed the Ninth Circuit's decision in *Dole Food*, its review was limited to the meaning of "ownership" in § 1603(b)(2), which extends agency or instrumentality status to an entity "a majority of whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. § 1603(b)(2); *see Dole Food*, 538 U.S. at 471 (explaining question presented as whether "a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary"). In addition, this Court held that instrumentality status under § 1603(b) must be determined at the time the suit is filed. 538 U.S. at 478. This Court did not review the Ninth Circuit's analysis of organ status under the FSIA.

contrary to § 1603(a), which expressly states that the term "foreign state" "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). Section 1603(b) defines an agency or instrumentality to include any entity that (1) "is a separate legal person, corporate or otherwise," and (2) "is an organ of a foreign state or political subdivision" of a foreign state, and (3) "is neither a citizen of a State of the United States" nor "created under the laws of any third country." *Id.* § 1603(b)(1)-(3). The Ninth Circuit held that Powerex's "high degree of independence" from the Province denied it organ status, Pet. App. 16a, but, to be an agency or instrumentality at all, the entity must be "a separate legal person, corporate or otherwise." 28 U.S.C. § 1603(b)(1). The Ninth Circuit's new approach thus functionally nullifies a statutory prerequisite for a sovereign "agency or instrumentality" because it posits that an independent entity *cannot* be the sovereign's "organ." *Cf. EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir.) (concluding that organ status remains appropriate even where the entity "has some autonomy from the foreign government"), *cert. denied*, 540 U.S. 1003 (2003); *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) (explaining that organ status is not defeated "even though the government was not involved in the day-to-day activities" of the entity); *see also Gates*, 54 F.3d at 1461 ("that the Province is not directly involved in the day-to-day activities of [an agency] does not mean that it is not exercising control over the entity").

Second, the Ninth Circuit's "lack of financial support from the government" prong (Pet. App. 16a) finds no support in the text of the FSIA or in logic.[11] The text, in fact,

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[11] Worse still, the Ninth Circuit's application of its erroneous legal standard is not even supported by the record facts. Powerex does enjoy financial support from the Province, relying on the Province's credit rating to support its trades in the electricity market and financial guarantees issued by BC Hydro in support of Powerex's export trade.

rebuts the Ninth Circuit's suggestion because a foreign sovereign can still retain its sovereign status when it engages in "commercial activity" even though it will not be completely immune from suit. 28 U.S.C. § 1605(a)(2). On that basis, numerous courts have held that a foreign sovereign entity engaging in commercial activity – such as Powerex – is still entitled to remove a suit from state court and to litigate in federal court under procedural protections afforded by the FSIA. *See, e.g., USX*, 345 F.3d at 209; *EIE Guam*, 322 F.3d at 635. That is because, notwithstanding an absence of substantive immunity, "[t]he FSIA is the exclusive source of subject matter jurisdiction over suits involving foreign states and their instrumentalities." *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654 (9th Cir. 1996). Certainly nothing in the text suggests that Congress intended to distinguish between sovereigns engaging in commercial activity that need to be subsidized by the government and those that do not. And such a notion is flatly inconsistent with the United States government's practice, which operates instrumentalities such as BPA to generate low-cost electricity for consumers and affords those instrumentalities complete immunity from suit.[12]

Finally, the Ninth Circuit's fourth categorical factor – whether the foreign entity received "special privileges or obligations" under the foreign sovereign's law – was defined by the court below as solely whether the foreign entity was immune from suit under foreign law. Pet. App. 16a. That factor, however, ignores that a foreign sovereign can imbue its organs with numerous "privileges or obligations" without necessarily conferring full immunity

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[12] The Ninth Circuit's emphasis on substantive immunity is particularly improper here as Powerex acknowledged that its electricity sales in the United States constitute a "commercial activity" within the enumerated exceptions to sovereign immunity under § 1605(a)(2) of the FSIA. That exception has no relevance to Powerex's entitlement as a foreign sovereign to jurisdictional and procedural safeguards of the FSIA.

from suit. In Powerex's case, those "privileges or obligations" include exemption from Provincial and federal taxation,[13] a remittance of income to BC Hydro's consolidated financial statement or directly to the Province, and a mandate that the organ perform treaty functions and governmental purposes not required of private entities. As a litmus test, the one chosen by the Ninth Circuit below is especially odd and regressive. Strikingly, such a test ignores that Congress, in requiring an organ of a foreign state to be a "separate legal person," specifically intended the term to encompass "a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, *can sue or be sued in its own name*, contract in its own name or hold property in its own name." H.R. Rep. No. 94-1487, at 15, 1976 U.S.C.C.A.N. at 6614 (emphasis added). Instead, the Ninth Circuit's test would impose on foreign sovereigns a duty under their own law to make their organ immune from suit solely so they could litigate in a United States federal court *without* substantive immunity under the commercial activities exception. Nothing in the text or purposes of the FSIA compels such a strange result.

B. The Ninth Circuit's Decision Conflicts With Three Circuits On Whether A Commercial Entity Performing Government Functions Is An Organ Of A Foreign State

1. The Ninth Circuit below established a standard for determining organ status under the FSIA that departs from the existing majority test and creates a significant split of authority among four federal circuits. Consequently, foreign governments now lack a "predictable, uniform jurisdictional scheme" under the FSIA. *See* Della-

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[13] *See, e.g., Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 820 (3d Cir. 1991) (en banc) (discussing "attributes associated with sovereignty" including exemption from taxation); *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 507 (9th Cir. 1989) (explaining that "immun[ity] from taxation on the sale of electricity" is an "attribute[] of . . . sovereign[ty]").

penna, *supra*, 9 Willamette J. Int'l L. & Disp. Resol. at 92. That result is entirely inconsistent with Congress's intent in passing the FSIA to confer "broad jurisdiction in the Federal courts" to ensure "uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, at 13, 1976 U.S.C.C.A.N. at 6611.

Applying these principles, a majority of circuit courts has rejected the rigid analysis adopted by the Ninth Circuit in this case and concluded that "an entity that engages in activity serving a national interest and does so on behalf of its national government qualifies for the protections of the FSIA, including a federal forum." *USX*, 345 F.3d at 209. In making that assessment, those courts examine six separate and independent factors: (1) the "circumstances surrounding the entity's creation"; (2) the "purpose of its activities"; (3) the entity's "independence from the government"; (4) the "level of government financial support"; (5) the entity's "employment policies"; and (6) the entity's "obligations and privileges under the foreign state's law." *Id.* at 206, 209; *see also Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.), *cert. denied*, 125 S. Ct. 677 (2004); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000). A host of district courts has likewise followed the majority's multi-factor approach.[14] Mindful, however, that Congress intended to accord foreign entities "immunity not only from liability,

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[14] *See, e.g., In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 790-91 (S.D.N.Y. 2005); *RSM Prod. Corp. v. Petroleos de Venezuela Societa Anonima*, 338 F. Supp. 2d 1208, 1215 (D. Colo. 2004); *Shirobokova v. CSA Czech Airlines, Inc.*, 335 F. Supp. 2d 989, 991 (D. Minn. 2004); *Filler v. Hanvit Bank*, 247 F. Supp. 2d 425, 428 (S.D.N.Y. 2003), *vacated in part on other grounds*, Nos. 01 Civ. 9510 *et al.*, 2003 WL 21729978 (S.D.N.Y. July 25, 2003), *aff'd*, 378 F.3d 213 (2d Cir.), *cert. denied*, 125 S. Ct. 677 (2004); *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 Civ. 6124, 1999 WL 307666, at *5 (S.D.N.Y. May 17, 1999), *aff'd*, 199 F.3d 94 (2d Cir. 1999); *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 378-79 (E.D. Pa. 1997).

but from the burdens of litigation as well," these courts will "*not* apply them mechanically or require that all . . . support an organ-determination." *Kelly*, 213 F.3d at 847; *see also USX*, 345 F.3d at 207, 209 (noting "congressional goals of promoting uniformity of decision and avoiding impairing foreign relations," and concluding that "no one [factor] is determinative").

2. The Ninth Circuit initially appeared to have adopted a standard comparable to that of the other circuits. *See Gates*, 54 F.3d at 1460-61 (concluding that the Alberta Pork Producers Development Corporation, a Canadian entity established pursuant to the Alberta Marketing of Agricultural Products Act, constituted an organ of the Province because it was established pursuant to Provincial statute and served Provincial public policy purposes); *Corporacion Mexicana*, 89 F.3d at 655 (holding that Pemex Refining qualified as an organ of the Mexican government because it was "created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation" and granted "exclusive responsibility of refining and distributing Mexican government property").

In *Dole Food*, however, the Ninth Circuit adopted a new test that contrasted with Congress's expectation that the FSIA would govern jurisdiction over suits brought against the organs of foreign states engaged in commercial activities. The court considered the organ status of entities "created by Israel for the purpose of exploiting the Dead Sea resources owned by the government" and "classified as 'government companies' under Israeli law." 251 F.3d at 808. In addition, the government "had the right to approve the appointment of directors and officers, as well as any changes in the capital structure" of the entities, and the power to "constrain" the entities' use of profits as well as the salaries of the directors and officers. *Id.*

Although acknowledging these facts, and characterizing the question as "close," the court ultimately concluded that the entities did not qualify as instrumentalities under the FSIA. The court based its conclusion on the ab-

sence of any "regulatory authority" by the entities and the entities' employment of private rather than civil servants. *Id.* The court did not explain what, if any, significance it attributed to the circumstances surrounding Israel's creation of the entities or the concededly public purpose of exploiting governmental resources. *Dole Food* thus shifted away from the sound approach of the Second, Third, and Fifth Circuits by de-emphasizing certain attributes of sovereignty while elevating the importance of commercial activities in denying the protections of the FSIA.

3. The court's decision in this case now confirms that the Ninth Circuit has indeed rejected the contextual approach advanced by other circuits, thereby creating a clear split of authority on the meaning of a key provision in the FSIA. The Ninth Circuit's new approach ignores two basic factors relied on by the other circuits to determine an entity's organ status. First, the Ninth Circuit no longer considers the circumstances surrounding the creation of a governmental entity. It is illogical, however, to attempt to determine whether an entity serves a sovereign purpose on behalf of a foreign government without any consideration of the circumstances that led to its creation. *See USX*, 345 F.3d at 210. Second, the Ninth Circuit gives no weight to the employment policies and responsibilities of the entity. Yet employment policies are a common means of imposing governmental oversight and furthering the public mission of a governmental agency.

The test applied by the court below renders both of those factors irrelevant or insufficient. There is simply no reading of the Ninth Circuit's decision, therefore, that will reconcile the court's new "categorical" approach to an entity's sovereign status with the decisions of the other circuits where no one factor is deemed "determinative." *USX*, 345 F.3d at 209; *Kelly*, 213 F.3d at 847.

4. Had the Ninth Circuit below applied the totality-of-the-circumstances approach to organ status accepted in the Second, Third, and Fifth Circuits, which includes assessment of the circumstances surrounding Powerex's

creation and the employment policies imposed by the Province of British Columbia, the court would have readily concluded that Powerex qualified as an "organ" of British Columbia.[15]

First, the circumstances surrounding Powerex's creation establish a sovereign purpose and thus "weigh more heavily in favor of organ status." *USX*, 345 F.3d at 210. Powerex was created by a directive of the Province's Minister of Energy to act as the Province's exclusive export agency for marketing the Province's governmentally owned and generated surplus hydropower capacity in a manner that maximized benefits to British Columbia and its citizens. *See Corporacion Mexicana*, 89 F.3d at 655 (Pemex Refining qualified as an organ of the Mexican government because it was "created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation" and granted "exclusive responsibility of refining and distributing Mexican government property").

To fulfill these goals, Powerex was created as a wholly owned subsidiary of a Canadian Crown Corporation of the Province that is the Province's agent by statute. Powerex was also assigned Provincial treaty rights and obligations under the Columbia River Treaty and the Skagit River Treaty, and now carries out treaty obligations concerning natural resources within the Province's exclusive control. Powerex is inseparable from the Province in critical respects (including use of the Province's credit rating) and is directly controlled by the Provincial Government through its role in appointing and approving the members of Powerex's board. Finally, Powerex's revenue does not result in private "profits," but is instead consolidated with those

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[15] This Court has explained that, while "[i]t is not customary for this Court to review the sufficiency of the evidence, . . . we will do so when the issue is properly before us and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) (collecting cases).

of its parent, BC Hydro, and made available for distribution for public purposes through the Province's consolidated general revenues (or, in the case of a portion of the proceeds from sale of the Canadian Entitlement, made available directly to the Province).

By ignoring these circumstances surrounding Powerex's creation, the Ninth Circuit failed to consider the "national purpose" that Powerex serves in developing the water resources of British Columbia and in performing treaty obligations for Canada. *See Kelly*, 213 F.3d at 848 (concluding entity was created for a national purpose "because it was formed by government decree to develop and explore Syria's mineral resources, control over which is a basic aspect of sovereignty").

Second, the employment policies imposed on Powerex by the Province indicate the public nature of Powerex's functions. Although not considered by the Ninth Circuit, Powerex is controlled by governmental appointees. The Lieutenant Governor in Council (the Executive Council of the Province) directly appoints BC Hydro's board of directors, which, in turn, appoints the Powerex board. *See* Pet. App. 58a-59a. A subset of the Provincially appointed BC Hydro board constitutes the majority of the seven seats on Powerex's board, and the remaining outside directors must be confirmed by the Premier's office. *See id.* at 59a. The Province also retains authority to approve the appointment of Powerex's outside directors. *See id.*.

Moreover, while the Province does not directly pay the salaries of Powerex employees, Powerex is forced to comply with Provincial guidelines for public employee compensation. *See* C.A. ER (PWX) 788 (Peterson Dep.). These guidelines constrain Powerex from paying rates to its employees that are paid by private energy companies. The Province also guarantees the pension benefits of Powerex's employees. *See id.* at 797; *cf. USX*, 345 F.3d at 213 (participation in private rather than public pension plan does not support organ status).

All of these facts, together with factors such as Powerex's exemption from Provincial or federal taxation and its access to BC Hydro financial support for export trade transactions, confirm that, under the plain meaning of the term "organ" in § 1603(b)(2) that is uniformly applied by the Second, Third, and Fifth Circuits, the Ninth Circuit should have reversed the district court's ruling that the case was not properly removed.[16]

C. Uniform Application Of The FSIA's Protections Is Of Surpassing Importance To Foreign Governments Conducting Business In The United States

The volume of commerce that will be affected by the Ninth Circuit's ruling is staggering. From 2000 through 2004, a mere three Canadian crown corporations – Hydro-Quebec, New Brunswick Power Corp., and Manitoba Hydro-Electric Board – exported more than $13.8 billion Canadian of energy products into the United States, and Powerex itself exported $10.9 billion Canadian.[17] In 2001-

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[16] In addition to its misunderstanding of the facts and law of the factors on which it *did* rely, the Ninth Circuit erred in perceiving the Dead Sea Companies in *Dole Food* as the most analogous entities. The Dead Sea Companies in *Dole Food* were not wholly owned by the government, did not perform treaty functions, and did not return profits to the government. Rather, the proper analogy should have been to *EIE Guam*, 322 F.3d at 640-41. There, as here, the government had created the corporation "to perform a public function" and "'to carry out [the foreign government's] national policy.'" *Id.* at 640. The government had also vested exclusive authority in and provided funding for the corporation "'to perform such activities.'" *Id.* In all of those respects, Powerex is like the government corporation in *EIE Guam*, which was permitted to remove a case filed in Guam territorial court and to litigate instead in federal court. *See id.* at 637.

[17] *See* Hydro-Quebec, *Annual Report 2004*, at 107 (Mar. 31, 2005); Hydro-Quebec, *Annual Report 2002*, at 97 (Mar. 31, 2003); Hydro-Quebec, *Annual Report 2001*, at 91 (Mar. 31, 2002); BC Hydro, *2005 Annual Report* at 109 (June 29, 2005); BC Hydro, *2004 Annual Report* at 124 (June 14, 2004); BC Hydro, *2003 Annual Report* at 127 (July 21, 2003); BC Hydro, *2001 Annual Report* at 67 (July 11, 2002); New Brunswick Power Corp., *2003/04 Annual Report* at 47 (June 30, 2004);

2003, Canada's energy exports to Ninth Circuit states totaled more than $20.9 billion.[18]

When, inevitably, disputes regarding this cross-border commerce arise within the Ninth Circuit's territorial reach, entities sharing the characteristics of Powerex will be subject to major uncertainties about their procedural and substantive rights under the FSIA. Should the Ninth Circuit's new interpretation of § 1603(b)(2) stand, corporations created by foreign governments will face not only the prospect of being confined to state court – no mere idle concern given that California's federal district judges have recused themselves in cases arising out of the California energy crisis of 2000-2001 but California's state judges have not – but also a loss of the very sovereign immunity codified in the FSIA. In stark contrast, foreign entities operating within the Second, Third, and Fifth Circuits will continue to benefit from the multi-factor, fact-sensitive approach to determining organ status. As a result, plaintiffs seeking to sue foreign sovereign corporations will have every incentive to engage in forum shopping by suing in state court in Ninth Circuit states, a phenomenon that portends a chilling effect on future cross-border and international trade, or, even worse, may spark international trade disputes.

New Brunswick Power Corp., *2002/03 Annual Report* at 44 (June 30, 2003); New Brunswick Power Corp., *2001/02 Annual Report* (June 28, 2002); New Brunswick Power Corp., *2000/01 Annual Report* at 45 (June 28, 2001); Manitoba Hydro-Electric Board, *53rd Annual Report* at 87 (Aug. 11, 2004); Manitoba Hydro-Electric Board, *51st Annual Report* at 51 (July 29, 2002); Manitoba Hydro-Electric Board, *49th Annual Report, summary available at* http://www.hydro.mb.ca.

[18] Canadian Embassy, *State Trade Fact Sheets 2004, available at* http://www.canadianembassy.org; Canadian Embassy, *State Trade Fact Sheets 2003, available at* http://www.dfait-maeci.gc.ca; Canadian Embassy, *State Trade Fact Sheets 2002, available at* http://www.dfait-maeci.gc.ca.

D. The Ninth Circuit's Decision Creates Significant Tensions With The United States' Obligations Under The North American Free Trade Agreement

Resolution of the circuit conflict created by the Ninth Circuit's decision is critically important to avoid disrupting the growth of cross-border trade in North America under NAFTA.[19] NAFTA Article 1102(1) makes clear that the U.S. must guarantee Powerex "treatment no less favorable than it accords, in like circumstances," to domestic investors. NAFTA art. 1102(1), 32 I.L.M. at 639 (Pet. App. 147a). This "broad requirement" establishes that there "shall be no discrimination by a Party as between domestic and foreign investors." Daniel Q. Posin, *The Multi-Faceted Investment Arbitration Rules of NAFTA*, 13 World Arb. & Mediation Rep. 13, 13-14 (2002). By treating other comparable and functionally similar U.S. wholesale power suppliers such as BPA and WAPA as sovereign entities while denying Powerex's status as a foreign sovereign – even though BPA and Powerex alike perform governmental duties under the Columbia River Treaty – the decision below gives an unfair national benefit to a U.S. entity in discrimination against a Canadian entity.

Such treatment violates NAFTA standards and unnecessarily entangles the courts in matters of foreign economic policy entrusted to the Executive Branch. *See* Todd Weiler, *The Treatment of SPS Measures Under NAFTA Chapter 11: Preliminary Answers to an Open-Ended Question*, 26 B.C. Int'l & Comp. L. Rev. 229, 241 (2003) (the goal of the non-discrimination clause "is to provide the foreign firm with the promise of an effective equality of competitive opportunities between it and its competitors"). Moreover, by applying a different standard for

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[19] North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, done Dec. 17, 1992, 32 I.L.M. 289.

organ immunity to Powerex than previously applied to foreign investments by a Mexican entity (in *Corporacion Mexicana*), the Ninth Circuit's decision below fails to "accord to investors of [the Province] treatment no less favorable than that it accords, in like circumstances, to investors of any other" NAFTA member nation. NAFTA art. 1103(1), 32 I.L.M. at 639 (Pet. App. 148a). The Court should thus grant certiorari to correct the Ninth Circuit's erroneous view of the FSIA and the resulting tension with the principle of non-discrimination underlying NAFTA.

II. THE NINTH CIRCUIT'S "OWNERSHIP" HOLDING CONFLICTS WITH *DOLE FOOD*

Even if it was proper to depart from the multi-factor test used by the other circuits to determine organ status, the Ninth Circuit committed a second error that directly conflicts with this Court's guidance on an issue of great significance: the court rejected Powerex's argument that common law principles of agency remain applicable to entities owned by foreign governments through statutory agents in determining whether an entity is "owned" by the foreign government. By holding that such principles do not apply, the Ninth Circuit has adopted a legal test for ownership that conflicts with this Court's precedent on an issue with substantial ramifications for corporate agencies of all foreign governments.

Section 1603(b)(2) defines an agency or instrumentality of a foreign state to include both organs of the foreign state and entities "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." In *Dole Food*, this Court held that courts must construe § 1603(b)(2) using the "basic tenet[s]" of American corporate law. 538 U.S. at 474. The Court explained that, in drafting § 1603(b)(2), Congress "was aware of settled principles of corporate law and legislated within that context." *Id.*; *see also* H.R. Rep. No. 94-1487, at 15, 1976 U.S.C.C.A.N. at 6614.

Consistent with *Dole Food*, Powerex argued that BC Hydro's sole ownership interest in Powerex – held on

behalf of the Province as its statutory agent – was sufficient to satisfy § 1603(b)(2). It is undisputed that under Provincial statutory law BC Hydro "is for all its purposes an agent of the government and its powers may be exercised *only* as an agent of the government." Hydro Act § 3(1) (Pet. App. 165a) (emphasis added). As the British Columbia Court of Appeals has recognized, "[s]ince its establishment BC Hydro has been an agent of the Crown in right of the Province." *Westbank First Nation v. British Columbia Hydro & Power Auth.*, [1997] 154 D.L.R. (4th) 93, *aff'd*, [1999] 4 C.N.L.R. 277. As such, all of the property owned by BC Hydro has been authoritatively adjudicated by Canadian courts to be owned by the Province. *See id.* at 98 (holding that property of BC Hydro is held as "the interest of the Crown in right of British Columbia and immune from taxation"). There is no logical basis for treating BC Hydro's 100% share interest in Powerex any differently from the other property BC Hydro owns on behalf of the Province.

As the Province's *agent*, BC Hydro had power to bind the Province as principal, as well as the authority to act at the Province's direction. *See Restatement (Second) of Agency* § 7 (1958) ("Authority is the power of the agent to affect the legal relations of the principal"). BC Hydro's ownership of Powerex's shares thus is legally imputed to the Province. *See id.* §§ 1, 7-8 (agent acts for the principal when performing with actual or apparent authority); *see also In re Focus Media Inc.*, 387 F.3d 1077, 1082 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1674 (2005); *Mutual Life Ins. Co. v. Mooreman*, 366 F.2d 686, 689 (9th Cir. 1966).

The Ninth Circuit failed directly to address this argument and instead flatly concluded that, under *Dole Food*, "unless the foreign government itself actually owns the shares, the entity does not meet the definition of a foreign state." Pet. App. 16a. The court thus interpreted *Dole Food* as a firm rule that ownership by a foreign government through an agent created by statute is always insufficient to create sovereign status under § 1603(b)(2).

The Ninth Circuit's holding, however, failed to recognize that *Dole Food* addressed an entirely different question: whether § 1603(b)(2) created a *categorical* exception to the customary rule of corporate law that a corporate parent owning shares of a subsidiary does not have legal title to the assets of the subsidiary *for that reason alone*. *See* 538 U.S. at 474. This Court's decision in *Dole Food* begins by explaining the "basic tenet of American corporate law . . . that the corporation and its shareholders are distinct entities." *Id.* Under that rule, "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary." *Id.* at 475. The Court then noted that this "tiered" corporate structure (where a parent controls a subsidiary through an intermediate entity) is not an absolute bar to derivative ownership, and that "[t]he veil separating corporations and their shareholders may be pierced in some circumstances." *Id.* Reviewing the history of the FSIA, however, this Court found "no authority" to interpret the FSIA "as piercing the veil in all cases," and nothing to indicate that "Congress intended us to depart from the general rules regarding corporate formalities." *Id.* at 475-76. *Dole Food* thus preserves the common law rule that the interests of two otherwise distinct corporations could be deemed a single enterprise for equitable purposes "on a case-by-case basis." *Id.* at 475.

Contrary to the Ninth Circuit's assumption below, the type of tiered ownership question at issue in *Dole Food* is simply not present here, where a statutory agent of the sovereign is created and its acts of corporate ownership are imputed to its principal, the foreign government, by operation of statute. Powerex invoked the "case-by-case" exception preserved by this Court and argued that BC Hydro, as the statutory agent of the Province, necessarily held all of the shares in Powerex on behalf of its principal, the Province. The court, however, misinterpreted Powerex's argument as claiming that tiered ownership through BC Hydro was alone sufficient (the argument rejected in

Dole Food). As the record makes clear, Powerex argued only that the agency relationship between BC Hydro and the Province was an exceptional circumstance that did not implicate the standard rule of separateness under corporate law. In failing to address that argument, the Ninth Circuit imposed a standard that is illogical and contrary to this Court's interpretation of congressional intent in drafting § 1603(b)(2).

The consequences of that error are severe. The Ninth Circuit's decision sweeps all forms of beneficial ownership into *Dole Food*'s scope and disavows any role for common law principles that affect corporations in the analysis of governmental ownership under the FSIA. A rule that forecloses beneficial ownership under the FSIA strips governments of the flexibility that Congress legislated as essential to the dynamic and evolving needs of international trade and foreign relations. That result impermissibly alters this Court's precedent and should be rejected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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